



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D. M. Potts Corporation

File: B-247403.2

Date: August 3, 1992

David M. Potts for the protester.
Marilyn W. Johnson, Esq., and Stephen T. Orsino, Esq.,
Department of the Navy, for the agency.
Katherine I. Riback, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Exclusion of a proposal from the competitive range was reasonable where the record shows that the agency properly found the protester's proposal unacceptable under all three of the major evaluation factors and thus unacceptable overall.
2. Protest that a member of the technical evaluation team was biased against the protester is denied where there is no credible evidence of bias on the part of the technical official and the record supports the agency's rejection of the protester's proposal as technically unacceptable.
3. Where a small business offeror was found unacceptable under the evaluation criteria in the solicitation, the matter is one of technical acceptability rather than responsibility, and there is no requirement for referral to the Small Business Administration under the certificate of competency program.

DECISION

D. M. Potts Corporation protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N62467-92-R-0587, issued by the Naval Facilities Engineering Command, Charleston, South Carolina, for grounds maintenance at the Marine Corps Air Station Beaufort, South Carolina.¹ Potts contends that its

¹Potts previously protested the agency's use of competitive negotiation rather than sealed bidding procedures in the
(continued...)

exclusion from the competitive range was the result of a faulty and biased evaluation.

We deny the protest.

The RFP, issued on January 24, 1992, contemplated the award of a fixed-price, indefinite quantity contract for grounds maintenance services such as cutting grass, raking, litter collection and disposal, and removal of vegetation at fence lines. The solicitation specified that the contractor furnish all labor, supervision, equipment, and materials necessary to provide the required services. The RFP provided for the use of herbicides to perform some of the grounds maintenance functions when approved by the contracting officer. It also set forth the following three technical evaluation factors:

- a. Proposer's Overall Experience
- b. Functional Area Proposed Procedures
- c. Resources for Proposed Procedures

The solicitation further specified that the three technical factors were to be of equal importance and that the cumulative weight of the three technical factors was equal to price. Further, in addition to unit and extended prices for the various tasks, offerors were required to provide "supplemental pricing information" which was to consist of a breakdown of material and labor costs as well as data concerning the staff hours to be used.

In response to the RFP the agency received 12 proposals. After an initial technical evaluation, the agency determined six proposals to be acceptable or highly satisfactory. The agency included four of the six acceptable or highly satisfactory proposals in the competitive range; two were eliminated because their prices were too high. Potts' proposal was considered to be unsatisfactory under each of the three technical factors and was not included in the competitive range. Thereafter the agency conducted discussions, solicited best and final offers, and made award to R. W. Browning.

¹(...continued)

solicitation. In our decision denying the protest, we stated that the agency's conclusion that it needed to use competitive negotiation in order to conduct a comparative evaluation of the offerors' overall experience and proposed resources in light of the agency experience under the prior contract was reasonable. D. M. Potts Corp., B-247403, May 29, 1992, 92-1 CPD ¶ 479.

PROTEST ALLEGATIONS

Potts, the incumbent contractor for these services, protests its exclusion from the competitive range, arguing that it submitted a better proposal than the successful one it submitted under a prior solicitation issued by the Navy for the same services. The protester asserts that the evaluation of its proposal was arbitrary and the result of evaluator bias against it because of its performance as the incumbent contractor. Potts also contends that its elimination from the competitive range amounted to a determination of nonresponsibility which should have been referred to the Small Business Administration (SBA) for review under the certificate of competency (COC) program.

EVALUATION

The evaluation of proposals and the resulting determination as to whether an offer is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. Teltara, Inc., B-244930, Nov. 29, 1991, 91-2 CPD ¶ 510. In reviewing an agency's evaluation, we will not reevaluate the technical proposals but, instead, will examine the evaluation to ensure that it was reasonable and in accordance with the solicitation's evaluation criteria. Id.

Experience

The evaluators found Potts to be unacceptable under this factor because the four contracts Potts listed in its proposal did not include current satisfactory airfield maintenance and because its performance on one of the listed contracts--the prior ground maintenance contract for the Marine Corps Air Station--was unsatisfactory.

Potts says that its unsatisfactory rating was improper. First, Potts argues that it does have satisfactory airfield maintenance experience, citing its contracts at McGuire and Pease Air Force Bases listed in its proposal. Second, Potts complains that the evaluators favorably considered letters of commendation submitted by other firms and states that it too could have included such letters in its proposal but did not realize that they would be accepted. The protester has included numerous such letters with its protest submission. Finally, Potts objects to the evaluators' concerns about its past performance under its contract for these services. Potts seems to object to any consideration of its past performance and maintains that in any event it has made a number of changes in its operations which have resulted in improved performance and has in its proposal for the new

contract increased the resources that it will bring to bear on the work.

As far as the lack of current satisfactory airfield maintenance experience is concerned, of the four contracts listed by Potts in its proposal that indicated that it involved airfield maintenance, one was the prior grounds maintenance contract for the Marine Corps Air Station, for which Potts was the incumbent contractor and its performance was considered unsatisfactory, and one was for a contract at McGuire Air Force Base that was completed in 1986. Potts did not indicate in its proposal that the contract at Pease Air Force Base involved airfield maintenance. Consequently, we think that the evaluators could reasonably conclude, based upon Potts' proposal, that the firm lacked current satisfactory airfield maintenance experience.

Further, we do not understand why Potts did not submit letters of commendation with its proposal. There was no prohibition in the RFP against the use of such letters and we think that the evaluators reasonably considered those that were submitted with the other offerors' proposals. The letters which Potts has included in its protest submission obviously have no relevance to the evaluation, which properly concerned the material actually submitted with the proposal. See Teltara, Inc., supra.

Next, concerning the evaluators' assessment of Potts' past performance as the incumbent grounds maintenance contractor, we note that the protester included that contract in the experience section of its proposal. An agency properly may consider the offeror's unsatisfactory performance under that contract in such circumstances. See George A. and Peter A. Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286. Moreover, the fact that the offeror may have made changes to remedy prior unsatisfactory performance does not negate the unsatisfactory performance that did occur or the propriety of the evaluators taking that performance into account in assessing the value of the offeror's experience.

Proposed Procedures

The evaluators found Potts unacceptable under this factor for several reasons. First, the evaluators concluded that Potts' proposed level-of-effort was too low and that the firm did not propose a realistic field organization structure. In this regard, the evaluators noted that a mechanic position was proposed but the proposal failed to include either a description of that position or an equipment maintenance plan. Second, the evaluators were concerned about the equipment proposed by Potts. According to the agency, some of the equipment proposed, such as a slope mower, two small edgers and a single small dump truck,

indicated that Potts did not have a clear understanding of the type and amount of work required.

It is not clear from the record why the evaluators viewed the Potts level-of-effort as too low. However, given the unexplained proposed use of a mechanic, we think the evaluators could be concerned about the proposed field organization. We also think the evaluators were reasonably concerned about the proposed equipment.

In this respect, the protester, in addition to stating that it will use more equipment than it did under the prior contract, points out that it used a slope mower successfully under the prior contract, that its proposal stated that it would use a small tractor with an hydraulic edger in addition to the two small edgers listed, and that its use of a single dump truck was in fact over and above what was required. The record shows, however, that the agency was aware that Potts had used the slope mower under its prior contract, but it viewed such use as unsuccessful. The agency also considered that Potts proposed to use an hydraulic edger but, according to the agency, that type of edger needs repairs often and cannot be used in many tight areas. The agency also says that considering the relatively small number and type of other vehicles proposed by Potts, a single dump truck will not be adequate.

While it is clear that Potts disagrees with the agency's assessment of its proposed equipment, it has not shown that the agency's specific concerns about the use of the slope mower, the unreliability and lack of flexibility of the hydraulic edgers and the use of a single dump truck in the context of all of the vehicles proposed by Potts² were unreasonable. We therefore have no basis to interfere with the agency's judgment that Potts' proposal was unacceptable under this factor.

Resources

The evaluators rated Potts' proposal unacceptable under this evaluation factor for several reasons. First, the evaluators noted that the three key on-site personnel listed in Potts' proposal had performed in an unsatisfactory manner under the prior grounds maintenance contract for the Marine Corps Air Station. In this regard, the evaluators noted that the proposed quality control manager had no training or education in quality control and his experience was limited to the prior grounds maintenance contract for the Marine

²We have examined the equipment list contained in the awardee's proposal and find that the awardee proposed to use more vehicles than did Potts.

Corps Air Station. Second, the evaluators noted that the corporate personnel resources proposed by Potts were the same that the firm used for the prior grounds maintenance contract at the Air Station and that those resources had proved to be insufficient. The evaluators also concluded that the corporate resources were not identified in sufficient detail and that the job descriptions listed in Potts' proposal were vague.

Potts does not deny that the three key on-site personnel identified in its proposal received unsatisfactory performance ratings under the prior grounds maintenance contract. However, regarding the evaluators' concern about the lack of training and education of the quality control manager, Potts states that the evaluators referred to a resume of another employee, and that its proposed quality control manager has several years of grounds maintenance experience at the Air Station.

Even if Potts is correct that the evaluators considered the wrong individual, the resume of the individual actually proposed by Potts as the quality manager reveals no training or education in this area. Further, the resume shows that prior to his employment with Potts he had only 8 months experience operating "mowing equipment" and that he has worked for Potts for only about 1 year. We therefore have no reason to interfere with the agency's conclusion concerning the education and training of the proposed quality manager. After a careful review of the record and Potts' responses to the other aspects of the evaluation under this criterion, we also find no basis to find the evaluators conclusions unreasonable.

Evaluation Conclusion

Since the unacceptable ratings assigned to Potts' proposal under each of the three evaluation factors are reasonably supported by the record, we conclude that the agency properly gave Potts' proposal an overall rating of technically unacceptable. Since Potts' proposal was determined to be technically unacceptable, it was properly excluded from the competitive range irrespective of its low price and properly was not the subject of discussions. See TLC Sys., B-243220, July 3, 1991, 91-2 CPD ¶ 37.

MISCELLANEOUS ALLEGATIONS

Potts also contends that the evaluators were biased against it because of an alleged derogatory comment concerning the protester and its performance under the incumbent contract that it claims was made by one of the evaluators. The agency has submitted two affidavits, one from the evaluator

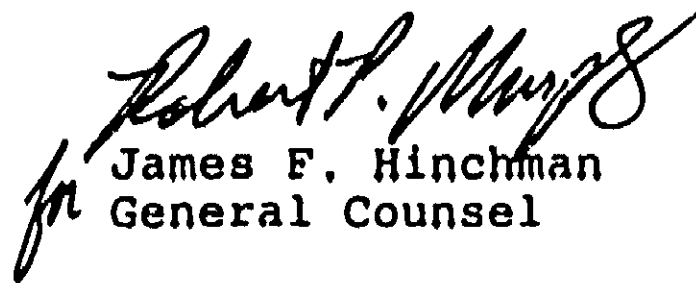
accused of making the statement and another from a person present during the exchange, that disputes this claim.

Government officials are presumed to act in good faith and, therefore, for us to conclude that bias existed, the record must contain convincing evidence that contracting officials had a specific and malicious intent to injure the protester. Jaycor, B-240029.2; B-240029.3, Oct. 31, 1990, 90-2 CPD ¶ 354. In addition to producing credible evidence showing bias, the protester must also demonstrate that the bias translated into agency action which unfairly affected the protester's competitive position. Northwestern Travel Agency, Inc., B-244592, Oct. 23, 1991, 91-2 CPD ¶ 363. Here, the only evidence which Potts maintains demonstrates evaluator bias against it in the evaluation is the evaluators' consideration of the poor past performance of Potts and some of its employees under the incumbent contract. While it is clear that Potts does not agree with the assessment of its performance, it is equally clear that in the opinion of agency officials Potts' performance left much to be desired. Under the circumstances, bias is not evidenced by the agency's consideration of such past performance matters. Further, as stated above, we have reviewed the evaluation in the context of Potts' arguments and find that the evaluators' conclusions are reasonably supported by the record. Given the lack of any credible evidence of bias in the evaluation of Potts' proposal, we have no basis upon which to question the motives of the evaluators.

Finally, Potts argues that its exclusion from the competitive range amounted to a determination of nonresponsibility which should have been referred to the SBA under its COC program. The deficiencies identified in Potts' proposal related to the technical evaluation factors set forth in the solicitation under which the agency has performed a comparative evaluation of the merits of the various proposals. These included experience, proposed procedures and corporate resources. Where an offer is found deficient in the context of a comparative evaluation conducted under the criteria specified in an RFP, the matter is one of technical acceptability, not responsibility. Modern Sanitation Sys. Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9. In a negotiated procurement, traditional responsibility factors may be used as technical evaluation factors, and so long as the agency performs a proper comparative evaluation/relative assessment of the competing

proposals under those factors, if a small business proposal is found to be deficient, referral to the SBA is not required. Id.

The protest is denied.


for James F. Hinchman
General Counsel